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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-380

SHELDON M. TUZMAN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX TO BRIEF

Page

ARGUMENT:

PART ONE

QUESTIONS PRESENTED 1

PART TWO

STATEMENT OF THE CASE 2

PART THREE

REASONS FOR NOT GRANTING THE WRIT 4

I. The admission of evidence of independent crimes used as proof of Petitioner's guilty knowledge, scheme, motive and intent does not violate his rights to fair and impartial trial and jury, to equal protection, not to be placed twice in jeopardy for one offense, to have his guilt proved by the State, and to defend his cause before the courts 4

II. The search warrant was based upon substantial and ample probable cause in the form of an affidavit and considerable oral testimony; thus, Petitioner's right to be safe from our unreasonable search and seizure was not violated 7

CONCLUSION 11

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

Page

Cases:

Anderson v. State, 222 Ga. 561, 150 S.E.2d 638 (1966) 7

Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 467 (1976) 9

Bastida v. Henderson, 487 F.2d 860 (5th Cir. 1973) 8

Fowler v. State, 121 Ga. App. 22, 172 S.E.2d 447 (1970) 9

French v. State, 237 Ga. 620, 229 S.E.2d 410 (1976) 7

Holt v. United States, 342 F.2d 163 (5th Cir. 1965) 6

Howard v. State, 211 Ga. 186, 84 S.E.2d 455 (1954) 7

Jackson v. State, 76 Ga. 551 (8) (1886) 5

Lee v. State, 8 Ga. App. 413, 69 S.E. 310 (1910) 6

New v. State, 67 Ga. App. 442, 20 S.E.2d 617 (1942) 7

Payne v. State, 233 Ga. 294, 210 S.E.2d 775 (1974) 5

People v. Johnston, 328 Mich. 213, 43 N.W.2d 334 (1950) 6

Sgro v. United States, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed 260 (1932) 9

State v. Tuzman, 145 Ga. App. 481, 243 S.E.2d 675 (1978) 3

Taylor v. Commonwealth, 186 Va. 587, 43 S.E.2d 906 (1947) 6

TABLE OF AUTHORITIES—Continued

Page

Cases—Continued:

Thomas v. State, 239 Ga. 734, 238 S.E.2d 888 (1977) 6

Tuzman v. State, 145 Ga. App. 761, 244 S.E.2d 882 (1978) 6

United States v. Alston, 460 F.2d 48 (5th Cir. 1972), *cert. denied*, 409 U.S. 871 (1972) 5

United States v. Broadway, 477 F.2d 991 (5th Cir. 1973) 5

United States v. Burkhart, 458 F.2d 201 (10th Cir. 1972) 5

United States v. Byrd, 352 F.2d 570 (2nd Cir. 1965) 6

United States v. Cochran, 499 F.2d 380 (5th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1974) 5

United States v. Harris, 482 F.2d 1115 (3rd Cir. 1973) 9

United States v. Johnson, 461 F.2d 285 (10th Cir. 1972) 9

United States v. Rahn, 511 F.2d 290 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975) 8

United States v. Welborn, 322 F.2d 910 (4th Cir. 1963) 6

Statutes:

Ga. Code Ann. § 38-202 6,7

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BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

QUESTIONS PRESENTED

1.

Whether the admission of evidence of independent crimes used as proof of Petitioner's guilty knowledge, scheme, motive and intent violates his rights to a fair and impartial trial and jury, to equal protection, not to be placed twice in jeopardy for one offense, to have his guilt proved by the State, and to defend his cause before the courts.

2.

Whether a search warrant that was based upon sub-

stantial and ample probable cause in the form of an affidavit and considerable oral testimony violates Petitioner's right to be safe from unreasonable searches and seizures.

PART TWO

STATEMENT OF THE CASE

For several years, Georgia medicaid recipients received dental services from Petitioner, Dr. Sheldon M. Tuzman. After discrepancies of medicaid claims for which Petitioner had been paid came to the attention of the State, extensive investigation of his participation in the medicaid program took place. On the basis of the investigation, the State sought two search warrants dated February 23, 1977.

The thrust of the search warrants and affidavit is that Petitioner was suspected of using examination and treatment records, x-rays, payment records and dental appliances as instrumentalities and tangible evidence of crimes of theft by deception. This evidence was based on information of claims and payments from a named State official of the Georgia Department of Human Resources, whose name was set forth in the affidavit.

The evidence was further based upon professional examinations of numerous patients of Petitioner by named members of a Peer Review Committee of the Georgia Dental Association.

Attached to the affidavit and incorporated therein was Petitioner's Medicaid Agreement wherein he agreed to keep such records as those sought. The issuing judge considered this along with the other evidence.

Specifically, the affidavit sets forth that Georgia Bureau of Investigation ("G.B.I.") Agent Wilkerson said that when he was in Petitioner's office on May 13, 1976,

the records were there. It further affirmed that Special Investigator Gene A. Matthews, in telephone conversations with Petitioner on February 14 and 15, 1977, corroborated circumstantially that the records were still at the office. The warrant was issued on February 23, 1977.

G.B.I. Agent James Duff and Special Investigator Matthews executed the search warrants on the evening of February 23, 1977, after being delayed by Petitioner.

A motion by Petitioner to suppress the seized evidence was denied. Moreover, Petitioner's objections to admission of the seized evidence during trial was overruled.

Petitioner was indicted on forty-one separate counts of theft by deception. Petitioner was granted a plea in bar as to thirty of the counts on the grounds that those counts involved less than $100 and were therefore misdemeanors barred by the statute of limitations. The State appealed that judgment in *State v. Tuzman*, 145 Ga. App. 481, 243 S.E.2d 675 (1978).

Evidence relating to the barred counts was introduced at trial, under long established Georgia authority, for the purpose of showing Petitioner's guilty knowledge, motive, scheme and intent. The trial court instructed the jury regarding the limited nature of the evidence concerning Petitioner's conduct for which he was not on trial. The Special Prosecutor emphasized the same numerous times. In his charge, the trial judge repeatedly elucidated the point that Petitioner was only on trial on eleven felony counts and not on any misdemeanor count. He instructed the jury to find Petitioner "not guilty" if any felony count showed theft of $100 or less.

Petitioner was found guilty of three felony counts for theft by deception. He was sentenced to five years on

each count as a "First Offender," placed on probation, fined $2,000 on each conviction and ordered to pay restitution.

Petitioner filed a notice of appeal in the Supreme Court of Georgia on June 3, 1977. The case was transferred to the Court of Appeals of Georgia, where it was heard. The Court of Appeals affirmed the judgment of the trial court on April 5, 1978. A motion for rehearing was denied by the Court of Appeals of Georgia on April 28, 1978. The Georgia Supreme Court denied Petitioner's application for writ of certiorari on June 9, 1978.

Additional facts will be developed as necessary for a more thorough illumination of any issues raised in this petition.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. The admission of evidence of independent crimes used as proof of Petitioner's guilty knowledge, scheme, motive and intent does not violate his rights to a fair and impartial trial and jury, to equal protection, not to be placed twice in jeopardy for one offense, to have his guilt proved by the State, and to defend his cause before the courts.

During the trial, evidence was admitted over Petitioner's objection, concerning thirty misdemeanor counts that were barred by the statute of limitations. Respondent limited the use of the independent crime evidence to the proof of Petitioner's guilty knowledge, scheme, motive and intent.

Generally, evidence introduced in a criminal trial should only relate to the specific offense charged; however, there are several established exceptions which allow

such evidence to be received in special circumstances and for limited purposes. *United States v. Burkhart*, 458 F.2d 201 (10th Cir. 1972). There are a myriad of cases illustrating the widespread acceptance of these exceptions. One exception, which is widely recognized, is the use of evidence of independent crimes to prove criminal intent where the independent crime and the crime charged occurred in close proximity in time and the essential physical elements of both offenses are identical. *United States v. Broadway*, 477 F.2d 991 (5th Cir. 1973); *United States v. Alston*, 460 F.2d 48 (5th Cir. 1972), *cert. denied*, 409 U.S. 871 (1972); *Jackson v. State*, 76 Ga. 551 (8) (1886).

Prior to admitting evidence of independent crimes for proof of intent, the probative value of the evidence is balanced against any prejudice that may result. *United States v. Cochran*, 499 F.2d 380 (5th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1974); *Payne v. State*, 233 Ga. 294, 210 S.E.2d 775 (1974). This balancing precaution was observed in the instant case. The use of the evidence of the misdemeanor counts was justified because the evidence tended to prove an intent which was an essential element of the offense on trial. In contrast, the evidence was not overly prejudicial because the jury was instructed throughout the trial that Petitioner was on trial only for the eleven felony charges. For instance, the Special Prosecutor, in his opening statement, was very clear in his explanation to the jury about the limited purpose of this evidence. On each occasion the State introduced evidence of the misdemeanors, the jury's attention was called to the fact of the limited purpose of the evidence. Finally, in the closing argument the Special Prosecutor reemphasized the limited purpose of the independent crime evidence. The trial court's decision that the probative value of such

evidence outweighed the danger of the prejudice was affirmed by the Court of Appeals of Georgia. *Tuzman v. State*, 145 Ga. 761, 244 S.E.2d 882 (1978). The Court of Appeals' position is in line with the prevailing view that the balancing of probative and prejudicial values should be left largely within the sound discretion of the trial judge. *United States v. Byrd*, 352 F.2d 570 (2nd Cir. 1965). Moreover, the trial court judge must be given considerable latitude in allowing evidence to show the element of intent. *Holt v. United States*, 342 F.2d 163, 166 (5th Cir. 1965).

Contrary to the Petitioner's view, the Georgia exclusionary rule, which can be found in Ga. Code Ann. § 38-202, has not been carried to an "unconstitutional extreme." It is generally accepted that an acquittal of the accused of an offense does not render evidence of that offense inadmissible at a later criminal trial where such evidence is otherwise competent. *United States v. Welborn*, 322 F.2d 910 (4th Cir. 1963); *Thomas v. State*, 239 Ga. 734, 238 S.E.2d 888 (1977); *Lee v. State*, 8 Ga. App. 413, 69 S.E. 310 (1910); *People v. Johnston*, 328 Mich. 213, 43 N.W.2d 334 (1950); *Taylor v. Commonwealth*, 186 Va. 587, 43 S.E.2d 906 (1947).

In the instant case, the Court's application of the exclusionary rule is particularly valid because of the close connection between the independent crime and the offense on trial. Petitioner, a dentist, was charged with stealing money under the Medicaid Program by making claims and receiving payments for work which he falsely claimed to have performed. The basic issue was whether his conduct resulted from an intention to steal or was it the result of honest mistakes. The evidence of his conduct in the processing of similar claims on the same and different

patients, from those named in the indictment, relating to similar dental treatment, the same administrative and dental process, and involving the same program during the same period of time, was highly relevant and material to the issue of intent. Hence, there was a substantial logical connection, so that the proof of one tended to prove the other.

Different jurisdictions vary as to the degree of proof required for admissibility of independent crime evidence, but the decisions in Georgia construing Ga. Code Ann. § 38-202 clearly do not require proof of the *corpus delicti*. *Anderson v. State*, 222 Ga. 561, 150 S.E.2d 638 (1966); *New v. State*, 67 Ga. App. 442, 20 S.E.2d 617 (1942). The State, nonetheless, has to show that the defendant on trial is the same person involved in those independent crimes. *French v. State*, 237 Ga. 620, 229 S.E.2d 410 (1976); *Howard v. State*, 211 Ga. 186, 84 S.E.2d 455 (1954). The proof of identity required in *French* and *Howard* is sufficient to assure that the evidence on the independent crime is more than a "mere suspicion." This conclusion is further supported by an assertion stated earlier in this brief: the independent crime and the crime charged are so intimately related that the proof of one cannot be made without showing of facts tending to establish the other.

Therefore, the introduction of evidence of very similar independent crimes did not violate Petitioner's constitutional rights. Consequently, his petition for a writ of certiorari based upon this argument should be denied.

II. The search warrant was based upon substantial and ample probable cause in the form of an affidavit and considerable oral testimony; thus, Petitioner's right to be safe from our unreasonable search and seizure was not violated.

In the present case, it was reasonable for the judge issuing the search warrant dated February 23, 1977, to conclude that the items to be seized were still located in the Petitioner's office.

Staleness relates to the probability of whether or not the evidence to be seized is still at the location to be searched. *United States v. Rahn*, 511 F.2d 290 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975). The affidavit in support of the warrant application showed that there was a direct observation of the Petitioner's office files on May 13, 1976. It further affirms that Special Investigator Matthews, in telephone conversations with Petitioner on February 14 and 15, 1977, corroborated circumstantially that the records were still at the office. The warrant was issued on February 23, 1977. Attached to the affidavit and incorporated therein was Petitioner's Medicaid Agreement wherein he agreed to keep such records as those sought.

In issuing a search warrant the judge must exercise his own judgment as to whether the facts alleged in the affidavit constitute probable cause for issuance of the warrant; he must act on the entire picture disclosed to him; he is entitled to use his common sense; and the courts have gone so far as to say that when this is done, his determination is conclusive in the absence of arbitrariness. *Bastida v. Henderson*, 487 F.2d 860, 863 (5th Cir. 1973).

In view of the facts in this case and the prevailing principle of law it was reasonable for the issuing judge to conclude that the records were still at the Petitioner's office.

Assuming, *arguendo*, that there was a nine month time gap between the issuance of the search warrant and the date on which the State had solid information as to the

whereabouts of the items seized, the type of crime and evidence involved prevents a staleness problem from arising in this case.

In *Sgro v. United States*, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed 260 (1932), this Court spoke to the issue of timeliness in a case involving a search under the National Prohibition Act. Although this Court found that a search executed twenty days after obtaining the information leading to the issuance of the warrant was invalid, *Sgro* also held that timeliness as an element in probable cause must be determined *by the circumstances of each case.*

In analyzing the circumstances of each case the question is one of reasonableness: Is the lapse of time so long that it is no longer reasonable to believe that the same conditions described in the affidavit remain at the time the warrant is issued? *Fowler v. State*, 121 Ga. App. 22, 172 S.E.2d 447 (1970). Factors to take into account in reaching a decision are the nature of the evidence sought and the unlawful activity. *United States v. Harris*, 482 F.2d 1115 (3rd Cir. 1973); *United States v. Johnson*, 461 F.2d 285 (10th Cir. 1972).

The evidence seized, in the instant case, included records that Petitioner was required to maintain and keep for considerable periods of time because of his Medicaid Agreement. Consequently, there was reason to believe that the documents would, in all probability, be preserved for more than the nine month period in question.

This Court recently upheld a warrant against a similar argument in a case where there had been a three month delay between the completion of the transactions on which the warrants were based and the ensuing action. *See Andresen v. Maryland*, 427 U.S. 463, 478 n.9, 96 S.Ct. 2737, 49 L.Ed.2d 467 (1976). The records, in the present

case, were prepared in the ordinary course of business and are much the same as the attorney's files in *Andresen;* they are permanent in character and they are likely to be maintained in one place much longer than would illicit drugs, stolen merchandise, or murder weapons. It would, therefore, be reasonable to believe that a nine month lapse would not prevent a proper determination that there was probable cause to believe the records would be found in appellant's office.

It is the State's conclusion that the Georgia Court of Appeals was correct in finding that the warrant was properly issued; therefore, this Court should deny Petitioner's request for writ of certiorari.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Court of Appeals of Georgia for the reasons set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the within and foregoing Brief for the Respondent in Opposition upon Mr. G. L. Dickens, Jr., at the address listed below, by placing the same into the United States Mail in a properly addressed envelope with first class postage placed thereon.

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This ____ day of _____, 1978.

_____

MICHAEL J. BOWERS
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